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# In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.,

Petitioner

VERSUS

ROBERT H. GRAY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## ORIGINAL BRIEF ON THE MERITS ON BEHALF OF ROBERT H. GRAY, RESPONDENT HEREIN

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# ORIGINAL BRIEF ON THE MERITS ON BEHALF OF ROBERT H. GRAY, RESPONDENT HEREIN

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MAY IT PLEASE THE COURT:

This is the original brief on the merits on behalf of Robert H. Gray, respondent herein.

## SUMMARY OF ARGUMENT

Respondent is entitled to benefits under the Longshoremen's Act by direct application or through the provisions of the Outer Continental Shelf Lands Act (OCSLA).

Since respondent was engaged in employment requiring the maintenance of pipelines carrying oil and gas from the outer Continental Shelf and was injured as a result of those activities, he is squarely covered under the provisions of 43 U.S.C. §1333(b), as found by the Benefits Review Board (Board).

At the time of the accident, Gray was aboard a fixed platform in the Gulf of Mexico slightly landward of the imaginary line separating the outer Continental Shelf from State Waters. This platform and others like it in the Bay Marchand field were customarily used to load and unload Gray and his equipment. Of course, the platform also adjoined navigable water. On the reasoning of the Court's previous decisions and because of the obvious, respondent submits that a fixed oil and gas production platform in the Gulf of Mexico is a covered situs.

Respondent also meets the status requirement of the act because his employment involving the discovery and recovery of oil and gas from the sea bottom is maritime commerce. Gray was transported in the oil field by ships and seaplanes, worked with minerals of the sea and routinely faced the hazards of the sea. To except Gray from Longshoremen's coverage would defeat the Congressional purpose of a rational and liberal construction since Gray cannot be distinguished from other marine petroleum workers presently covered.

The case of *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), as it concerns the application of admiralty tort jurisdiction, is not relevant here, not only because of the abandonment of the strict use of the locality test, but because the jurisdictional statutes involved have different histories and interpretations.



## ARGUMENT

### I. GRAY IS ENTITLED TO LONGSHOREMEN'S ACT BENEFITS BY VIRTUE OF THE PROVISIONS OF THE OUTER CONTINENTAL SHELF LANDS ACT

The Benefits Review Board held that Gray's injury was covered by the Outer Continental Shelf Lands Act (OCSLA) provision making the Longshoremen's and Harbor Workers' Compensation Act the applicable workers' compensation statute for injuries resulting from mineral operations on the outer Continental Shelf. As presently worded, that provision, 43 U.S.C. §1333(b), provides:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline, the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. §901 et seq.)

The Board found that Gray's injury was "the result of operations conducted on the outer Continental Shelf" though the platform on which he was hurt was located on the Louisiana side of the 3-mile line, stating:

> Evidence was adduced at the hearing that established that claimant's work was performed both in territorial waters and on the outer Continental Shelf, in fact, claimant estimated that approximately 25 percent of his time was spent aboard the K and M platforms located on the

outer Continental Shelf. Moreover, the platform on which claimant was injured was fed by a gas flow line that extended out to the outer Continental Shelf. Finally, the operations conducted by employer were located on both sides of the three-mile line of demarcation.

Insofar as claimant's employment as a maintenance welder is integrally related to the operations enumerated in Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that claimant has established coverage under the Act. (A-26)

In the decision below, the Fifth Circuit Court of Appeals did not reach the issue of Longshoremen's Act benefits via the OCSLA coverage provision, instead resting its affirmance of the Benefits Review Board on the view that the Longshoremen's Act provides coverage of its own force. However, the OCSLA does provide an alternative basis for affirming the result below. The Board found that facts presented at the administrative law judge hearing showed that Gray's injury occurred as the result of OCS operations, bringing him squarely within the OCSLA language. In that connection, it should be noted that Petitioners' Original Brief to this Court, p. 4 n.2, is quite misleading in stating that "by its very terms" the OCSLA does not apply here. By its very terms and on the Benefits Review Board's findings, it does apply.

## II. GRAY'S INJURY OCCURRED ON A SITUS COVERED BY THE LONGSHOREMEN'S ACT

The Longshoremen's Act covers injuries:

occuring upon the navigable waters of the United States (including any adjoining pier, wharf, dry



dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. §903(a).

The Court below found that fixed offshore platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." This conclusion meant that the platform was a covered situs under the quoted provision of the Longshoremen's Act. The Court below buttressed its "situs" conclusion by reliance on language from this Court's decision in *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. at 352, (1969), likening fixed platforms to "piers," 395 U.S. at 360, and to "wharves." 395 U.S. at 366.

This Court has had little occasion to consider the Longshoremen's Act situs issue. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977), involved two claimants, Caputo and Bludno. Caputo was hurt while rolling a dolly into consignee's truck parked at a terminal facility. This Court stated that situs was properly conceded by the employer, on the view that the entire terminal was the relevant area, it adjoined navigable water, and part of it—though not the part where Caputo was working—was used for loading and unloading ships. 432 U.S. at 279. Bludno was hurt while stripping a container on a finger pier that was not used for loading and unloading ships, but only for stripping and stuffing containers and for storage. This Court stated the employer's situs argument did not merit extended discussion, because probably a pier is qualified whether or not it is used for loading and unloading, 432 U.S. at 280, and in any event parts of the terminal area where Bludno was working were used for loading and unloading ships, 432 U.S. at 281.

In the case of *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979), also involving two claimants, Ford was hurt

fastening motor vehicles onto railroad flatcars. Bryant's injury occurred while he was moving a bale of cotton in a pier warehouse. Situs was conceded as to both claimants, 444 U.S. at 76 n. 6, because the entire terminal area where each claimant worked adjoined navigable water and part of each terminal—though not the part where either claimant worked—was used in loading and unloading ships.

On the reasoning of *Caputo* and *P. C. Pfeiffer,* the platform on which Gray was hurt was a covered situs because it adjoins navigable water and because part of it was customarily used in loading and unloading ships.

The Court below recognized the reality of the offshore oilfield. No "mental gymnastics"[1] or "bold action"[2] are needed to conclude that the platforms on which Gray worked were customarily used to load and unload equipment and crews. Aside from the obvious, the work records introduced into evidence before the Administrative Law Judge document hundreds of boardings from ships and seaplanes to various platforms in the Bay Marchand field by Gray and the loading of his welding equipment. (A __)

The only jurisprudence on the specific question whether a fixed offshore platform is a covered situs consists of several administrative law judge decisions, all of which concluded affirmatively. *Neal v. Wilson Wireline Services,* 2 BRBS 88 (1975); *Henning v. Vacco Wireline Services,* 2 BRBS 87 (1975); *Wiley v. Wilson Services,* 2 BRBS 86 (1975).

In light of this Court's decisions in *Caputo* and *Pfeiffer, supra,* and the administrative law judge decisions cited,

[1] Petitioners' Original Brief p. 16 n. 16

[2] Brief of Amici Curiae p. 4



respondent respectfully submits that the situs issue is not a serious issue in this case: clearly the fixed platform on which Gray was hurt was either a pier or wharf by analogy and/or an "adjoining area (adjoining navigable water) (parts of which were) customarily used...in loading, unloading...a vessel."

## III. GRAY MEETS THE STATUS REQUIREMENT OF THE LONGSHOREMEN'S ACT

The Longshoremen's Act covers injuries to an "employee," defined in section 2(3) as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker.....
>
> 33 U.S.C. §902(3).

The Court below concluded that Gray was engaged in "maritime employment," reasoning as follows:

> Gray did welding and maintenance work on offshore platforms. At the time of his injury, he was welding gas lines. His work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil. Offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981). Since Gray's work was a central part of that process, it obviously facilitated maritime commerce. Indeed, his work was 'an integral part' of maritime commerce, 'an essential and indispensable step' in the offshore drilling process. *Hullinghorst Industries v. Carroll,* 650 F.2d 750, 756 (5th Cir. 1980), cert. denied, 454 U.S. 1163 (1982). He was clearly employed in maritime employment....

The first step in validating the reasoning of the Court below is to establish that the section 2(3) Longshoremen's Act listing of categories of maritime employment—longshoring, shipbuilding, ship repair, ship breaking—is illustrative and not exhaustive. This Court's decision in *Director, Etc. v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983), supplies that step. Holding that worker injured in the course of their employment on actual navigable waters who would have been covered by the pre-1972 Longshoremen's Act are covered by the present Act, this Court stated that while there had been no previous occasion to consider the content of the "maritime employment" language of 2(3) outside the listed categories of longshoring, etc., "we do not maintain that landward coverage could never be determined by reference to anything but the explicitly enumerated categories of activities in the section 2(3) definition of 'employee'..." 103 S.Ct. at 648 n. 27. The *Perini* opinion found that several of the pre-1972 decisions in fact established that activities other than those enumerated in 2(3) qualify as "maritime employment" under the Act. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 144 (1941) held that a janitor employed by a small boat seller who drowned while riding in one of the employer's motor boats was entitled to Longshoremen's Act benefits because he was injured while engaged in maritime employment. 103 S.Ct. at 644. *Davis v. Department of Labor*, 317 U.S. 149 (1942), held on "twilight zone" reasoning that an employee injured while dismantling a bridge from a standing position on a barge was entitled to state workers' compensation, but the decision plainly implies and the commentators agree that the *Davis* claimant would have been entitled to Longshoremen's Act benefits. 103 S.Ct. at 644-45. nn. 20 and 21. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953) held that a railway brakeman, removing railroad cars from a car float by the



use of an ordinary switch engine, was engaged in maritime employment and was covered by the Longshoremen's Act. 103 S.Ct. at 645, n. 21.

A major point in *Perini* was that the employees' activities in *Parker, Davis* and *Pennsylvania Railroad* qualified as "maritime employment" because the injury occurred on actual navigable water. However, the *Perini* decision does show that the section 2(3) listing of categories of maritime employment is illustrative rather than exhaustive. Indeed, the *Perini* dissenter's major quarrel with the majority centered on that feature of the decision:

> The term 'maritime employment' expressly includes two important subcategories, both of which are defined with reasonable clarity. The question of construction that is presented is what, if any, additional categories of employment are included within the term 'maritime employment'. There are several independent reasons for not giving the term an expansive, essentially open ended reading.

The *Perini* case is also pertinent to the present inquiry in two additional respects. First, the Court reiterated that questions of Longshoremen's Act coverage are informed by a principle of liberal construction: "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." 103 S.Ct. at 647. (The same policy was stated in *Caputo, supra*, 432 U.S. at 268.) The Court below noted that an extremely harsh and incongruent result would flow from denying coverage to Gray:

> Workers injured on movable drilling barges are covered... Workers injured on fixed platforms located upon the Outer Continental Shelf receive LHWCA coverage through the Outer Continental

> Shelf Lands Act. Workers en route to fixed platforms are granted coverage.***To bar from the Act's coverage all fixed-platform workers in territorial waters would create a curious hole in LHWCA coverage.

The other relevant feature of *Perini* is its repeated stress on the intention of Congress in enacting the 1972 Longshoremen's Act amendments to ensure that there would be coverage for workers who regularly move in the course of their work from (pre-1972) covered to uncovered areas. (See e.g., 103 S.Ct. at 647, n. 26, quoting the Senate and House Committee reports, see also 103 S.Ct. at 648, n. 27.) Gray, the present claimant, regularly moved from work in the part of his employer's field located in Louisiana waters to work in the part located on the outer Continental Shelf. Hence, under any construction other than the one adopted by the Court below, he would regularly move in and out of coverage, a result the 1972 Congress was concerned to prevent.

The remaining step to validation of the status reasoning of the Court below is supporting the plausibility of construing offshore oil and gas activity as maritime commerce. In at least four decisions, the Fifth Circuit Court of Appeals has so held. In addition to the instant case, see *Thornton v. Brown & root, Inc.*, 707 F.2d 149 (5th Cir. 1983), *Boudreaux v. American Workover, Inc.*, 664 f.2d 463 (5th Cir. 1981), *rehearing en banc*, 680 F.2d 1034 (5th Cir. 1982), *cert. denied*, __ U.S. __, 108 S.Ct. 815 (1983); *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981). In *Thornton*, Judge Brown (whom this Court has referred to as "our leading admiralty authority." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971)) wrote that "it is firmly established in this Circuit" that offshore oil and gas exploration and



production is maritime commerce. 707 F.2d at 153. There is no law from other Circuits to the contrary, and no law from this Court to the contrary. (Section IV, *infra*, explains why petitioners' reliance on *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969), is misplaced.) Offshore oil and gas activity is maritime commerce because it takes place on platforms and other structures located in mid-ocean (*Pippen, supra*, 661 F.2d at 384 n. 9), because it involves the use of vessels and necessitates transportation of men and materials over water, and because the hazards confronted by the workers engaged in such activities—whether from platforms or floatable structures—are essentially the hazards of oil patch compounded by the hazards of the sea. (Court below, A-5, n. 2.)[3]

The question before this Court is the proper construction of the Longshoremen's Act term, "maritime employment." While the legislative history of the 1972 amendments to the Longshoremen's Act indicates that the term "maritime employment" is broader than the specific categories presented by way of illustration in section 2(3), there is no clear indication on the fixed platform issue. Congress did not provide an answer to the question presented, and the judiciary must supply it. (Petitioners appear to agree that it is a matter for the courts, asserting only that this Court, not the Court of Appeals, should decide it. Petitioners' Original Brief at 5, 17-18.) A conclusion against coverage in the present case would "create a curious hole"

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[3] A Bureau of Labor Statistics study announced October 7, 1983, showed that oil and gas field workers have almost twice as many work related accidents as compared to all other industries and 40% of the workers surveyed blamed conditions at the worksite such as slippery surfaces, limited work areas, and poor weather. *Insurance Advocate*, October 22, 1983, p. 11

Longshoremen's Act coverage, providing a kind of "checkered coverage (which) would harken back to the days of 'maritime but local' exceptions...." (Court below, 703 F.2d at __ and n. 2.) Reason and common sense suggest that the hazards to the fixed platform worker inside state waters do not differ from the hazards confronted by platform workers on the outer Continental Shelf, where there is clear Longshoremen's Act coverage via the OCSLA. Further, there is no reason to suppose that the hazards confronted by fixed and floating structure workers are appreciably different, and floating rig workers are now clearly covered by the Longshoremen's Act proper on the holding in *Perini, supra.* Affirming the Fifth Circuit view that offshore oil and gas activity is maritime commerce is the only way to avoid this curious hole in coverage.

Petitioners offer no practical or policy reason for denying coverage. (Amici suggest a potential backlog of Longshoremen's Act claims will result from affirming the decison below, giving no numbers, but the Department of Labor, which administers the Longshoremen's Act, supports coverage on the present facts.) The only significant argument adduced against coverage is a misreading of this Court's *Rodrigue* decision, treated in Part IV, *infra.* Respondent submits that the Court below was entirely correct in relying on Congressional intent to expand coverage, Congressional concern about the relative inadequacy of state workers' compensation benefits, and the undesirability of creating a "curious hole" in Longshoremen's Act coverage, in support of the eminently sensible conclusion that oil and gas workers on fixed platforms in mid ocean are engaged in maritime employment and are entitled to Longshoremen's Act benefits.



## IV. RODRIGUE DOES NOT SPEAK TO THE ISSUE BEFORE THE COURT.

The relevant portion of *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969) held that traditional princples of admiralty tort jurisdiction did not include injuries on fixed platforms, and that therefore the Death on the High Seas Act did not apply to such injuries. According to the *Rodrigue* opinion, traditional principles of admiralty tort jurisdiction did not cover fixed platform injuries because the locality of such injuries was as much "land" as "piers, jetties, bridges, or even ramps or railways running into the sea." 395 U.S. at 360. *Rodrigue* was a "locality" case. (Language in *Rodrigue* suggesting a preference for state law because of the close connection of OCS workers with the adjacent state was directed to the cognate point that Congress in the OCSLA did not intend to make maritime law applicable to fixed platforms.)

Subsequent references by this Court to the *Rodrigue* decision have treated it as a locality case. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971); *Nacirema Co. v. Johnson*, 396 U.S. 212, 215 n. 6 (1969). But locality is no longer the test for admiralty tort jurisdiction. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), explained why the locality test had not worked very well—both because it included within admiralty jurisdiction matters best left out *and* because it excluded from admiralty jurisdiction matters that should be included—and adopted a "significant relationship with traditional maritime activity" test. In *Foremost Insurance Co. v. Richardson*, __ U.S. __, 102 S.Ct. 2654 (1982), this Court explained that a central focus of *Executive Jet* had been the necessity of extending admiralty jurisdiction "to torts with a significant relationship to traditional maritime activity, but with no maritime locality." 102 S.Ct. at __, text and n. 4.

The *Foremost* discussion indicates that locality may not always be an independent requisite of admiralty tort jurisdiction. Furthermore, *Executive Jet* established that the Death on the High Seas Act can itself be a predicate for admiralty tort jurisdiction, independent of traditional principles. 409 U.S. at 274 & n. 26. See also *Smith v. Pan Air Corp.*, 684 F.2d 1102, __ (5th Cir. 1982). Thus, *Executive Jet* seems clearly to have altered the relied-upon features of *Rodrigue.*

A central point in *Rodrigue* was that Congress did not intend to treat fixed platforms like vessels, which has little to do with the maritime employment test under the Longshoremen's Act. Not only were petitioners Dore and Rodrigue clearly entitled to Longshoremen's benefits at the time of their death through the Lands Act, Dore, who was engaged in longshoring, could be covered directly after 1972 even though his work took place on a platform (pier). The reliance by petitioner here on *Rodrigue* ignores this plain language of the 1972 amendments specifically including piers, wharves and the like as the "ordinary stuff" of longshoring and maritime employment. 33 U.S.C. §903(a), U.S. Code Cong. and Admin. News 1972, p. 4708.

More to the point, however, is the clarity with which this Court has indicated that the tort jurisdiction principles at issue in *Rodrigue* and *Executive Jet* do not bear usefully on the question of coverage under the Longshoremen's Act. In *Perini, supra*, this Court stated that employer's reliance on tort jurisdiction principles was "misplaced" because the admiralty jurisdiction statute (28 U.S.C. §1333) and the Longshoremen's Act "are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.'" 103 S.Ct. at 649 n. 29. *Rodrigue* held that 28 U.S.C.



§1333 (as it was then being construed by the courts) did not cover fixed-platform injuries; it did not speak in any way to the coverage of the Longshoremen's Act. Furthermore, the Rodrigue Court expressly acknowledged that Congress clearly has the power to extend admiralty jurisdiction and/or all or part of federal maritime law to fixed platforms. 395 U.S. at 364. See also *Nacirema Co. v. Johnson*, 396 U.S. 212, 215 n. 7 (1969); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211 (1971). The question presented in the instant case is whether the 1972 amendments to the Longshoremen's Act have extended Longshoremen's Act coverage to such injuries. Except to the extent that it indicates that Congress certainly has the power to do that, *Rodrigue* is not relevant.

## CONCLUSION

Respondent submits that the opinion of the Fifth Circuit is a recognition of the realities of offshore oilfield work as maritime commerce. As stated by Judge Tate:

> "...marine petroleum workers are not 'fortuitously' located on the water, but are required to work there by the nature of their jobs, a substantial maritime relationship."
>
> *Boudreaux*, 680 F.2d at 1050.

Respondent was engaged in maritime employment because his overall employment included the maintenance of oil and gas lines carrying minerals from beneath the sea, transportation across navigable waters by vessels and the undertaking of risks and hazards peculiar to the sea.

The fixed platform on which Gray worked meets the status requirement because it is an obvious place where

loading and unloading of vessels occurs as is documented by Gray's work records.

Finally, Gray is covered by the Longshoremen's Act through the application of OCSLA because his employment is "integrally related" to the transportation by pipeline of natural resources from the outer Continental Shelf. The opinion of the Fifth Circuit should be affirmed by direct application of the Longshoremen's Act or through OCSLA.

Respectfully submitted,

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